Nos. 82-206 and 82-229

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In the Supreme Court of the United States

October Term, 1982

MEMPHIS FIRE DEPARTMENT, ROBERT W. WALKER, CITY OF MEMPHIS, JOSEPH SABATINI and FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioners,

vs.

CARL W. STOTTS, et al.,
Respondents.

PETITIONERS' JOINT OPPOSITION TO RESPONDENTS' SUGGESTION OF MOOTNESS

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Petitioners submit that respondents have failed to sustain their heavy burden of demonstrating mootness in the instant case. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 632-633 (1953).

Respondents contend that this appeal should be remanded for consideration of mootness in light of the Court's per curiam opinion in *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, ... U.S. ....., 51 U.S.L.W. 4566 (1983). Respondents argue that, as may be true in *Boston Firefighters*, the instant case has become moot on the basis that all employees adversely affected by the July, 1981 layoffs have been recalled to work and reinstated to their former positions.

An examination of the per curiam opinion in *Boston Firefighters* reveals that the grounds in that case for potential mootness are not present herein. The opinion in *Boston Firefighters* remanded that case for consideration of moot-

ness in light of a Massachusetts statute enacted subsequent to the 1981 Boston layoffs. This statute (1982 Mass. Acts, Ch. 190, §25) had the effect of:

> providing the city of Boston with new revenues, requiring reinstatement of all police and firefighters laid off during the reductions in force, securing these personnel against future layoffs for fiscal reasons, and requiring the maintenance of minimum staffing levels in the police and fire departments through June 30, 1983.

..... U.S. at ....., 51 U.S.L.W. at 4566. This statute protects Boston firefighters and policemen from the potential of layoffs for fiscal reasons. The Court referred to this statute as constituting the "changed circumstances" referred to in the Court's opinion.

The Court's per curiam opinion in *Boston Firefighters* draws from the principle, established firmly in the decisions of the Court, that intervening legislation may render an appeal moot where the legislation resolves the controversy at hand. *See, e.g., Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 465 (1982); *United States v. New Jersey State Lottery Comm'n*, 420 U.S. 371 (1975). While the Massachusetts statute may render the controversy moot in *Boston Firefighters*, there is no corresponding legislation on the state or local level in the instant case which would resolve the controversy before the Court. The employees of the Memphis Fire Department have no assurances against future layoffs for fiscal reasons. There are no "changed circumstances" in this case of the nature referred to in the Court's per curiam opinion in *Boston Firefighters*. For this reason, it would be inappropriate to remand this appeal for consideration of mootness.

Neither is the instant case moot, as respondents suggest, for the reason that all firefighters who were laid

off or demoted in rank have been rehired and returned to their previous positions. The parties to this action have no assurance that the circumstances giving rise to the District Court's order will not occur again. *Cf. County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Respondents' suggestion to the contrary is entirely speculative and is based upon statements of fact that appear absolutely nowhere in the record.

At a time when municipalities are experiencing all manner of highly-publicized financial problems, there is no guarantee that Memphis will not be forced to impose layoffs for fiscal reasons in the future. The circumstances of the instant controversy belie respondents' assertion that there can be no expectation of future layoffs. As proof of the highly speculative nature of respondents' predictions, petitioners would point to the fact that in April, 1980, none of the parties to the consent decree anticipated layoffs which became necessary in May, 1981. *See Stotts v. Memphis Fire Department*, 679 F.2d 541, 563 (6th Cir. 1982).

There is no question that this case, a certified class action, clearly presented the District Court and the Court of Appeals with a case or controversy in every sense contemplated by Article III of the Constitution. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 755 (1976). Those courts were presented with the instant controversy in an adversary context and in a form historically viewed as capable of resolution through the judicial process. *Id.* The single remaining inquiry regarding mootness is whether, in the face of the rehiring and reinstatement in rank of those firefighters affected by the 1981 layoffs, a "live" controversy remains at the time the Court considers the instant case. *Id.*

Petitioners would show that a live controversy still exists under the analyses utilized by the Court in prior

cases. The parties to this appeal retain a legally cognizable interest in the outcome. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969). Unlike *Boston Firefighters*, the members of the respondent class, the municipal petitioners, and the union petitioners continue to be involved in a minority employee-employer-labor representative relationship in which the potential against future layoffs has not been assured by statute or otherwise. Each party faces the potential for a repetition of the 1981 layoff scenario in which the continuing effect of the District Court's preliminary injunction would present a key issue.

While it may be urged that the order of the District Court in *Boston Firefighters* is a dead letter due to the subsequent enactment of the Massachusetts statute, the Order Granting Preliminary Injunction (*see* City and Union Petitions at A.77-79) and Order Expanding Preliminary Injunction (*see* City's Petition at A.82-83) have not been mooted by subsequent legislation and continue to enjoin seniority-based layoffs according to their terms. As the injunctions conflict with the bona fide seniority system otherwise in place, each of the parties to this appeal retains a legally cognizable interest in the outcome. As shown herein, the parties to this appeal retain such a stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court depends for elimination of difficult questions. *See Franks, supra*, 424 U.S. at 755 (1976).

As the orders below have not expired by their own terms or become moot by operation of statute, it cannot be said with certainty that there is no reasonable expectation that the orders of the District Court have no continuing effect. *Cf. County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Respondents' speculation that future layoffs are not foreseeable fails to sustain their "heavy"

burden of demonstrating mootness. *Id.* The municipal petitioners cannot provide assurances that further layoffs for fiscal reasons will not be necessitated during the effective period of the consent decree in this matter, nor would the petitioner union be satisfied with such assurances if given. Rather, the orders of the District Court impose a continuing obligation that is susceptible of review by this Court. *See J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 334 (1944).

The decisions below have an adverse effect on the petitioner City in that the District Court's orders, as affirmed, continue in effect. The District Court retains continuing jurisdiction to effectuate the consent decree and thereby override petitioner's established personnel policies. As the decree is presently interpreted by the District Court, any future layoff actions by petitioner City will be controlled by the orders herein. The City is therefore caught between the conflicting dictates of the present injunction and the City's personnel policy in favor of layoffs based on seniority.

Also, the adverse impact of the 1981 layoffs continues to affect those employees who were laid off or reduced in rank. During the period white firefighters were laid off, black firefighters with equal or less seniority continued to accumulate seniority while their white counterparts did not. One effect of the layoffs has been to render these white firefighters less senior for purposes of future job decisions and entitlements. For instance, those previously laid-off firefighters have a lessened expectation of future promotion, in which seniority is a relevant consideration. Also, those firefighters entitled under municipal charter to promotion to captain after 30 years' service (City of Memphis Charter, §67) will be delayed in the realization of this entitlement as a result of their layoff. Other continuing adverse impacts of the layoffs at issue herein

include loss of comparative seniority for purposes of future layoffs and a decreased priority in bidding on certain jobs and job transfers for affected personnel. (*See* Union Petition at A.80-81.) These and other adverse effects[1] of the underlying orders herein continue to impact the previously laid-off members of the union petitioners, in addition to their loss of pay during the period of the layoffs.

If the Court should otherwise conclude that the instant controversy is now moot, this appeal remains "live" by virtue of the fact that the underlying dispute among the parties is one "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911). Due to their subject matter, the primary effect of the orders of the District Court could be expected to dissipate during the normal time required for the resolution of the controversy. *See Sosna v. Iowa*, 419 U.S. 393, 402 (1979). As is the case herein, attrition in the ranks of department personnel (through retirement, discharges, resignations and the like) would enable a typical municipality to reinstate previously laid-off employees during the interim prior to review by this Court. The instant controversy is capable of repetition in that there are no statutory assurances against future layoffs as in *Boston Firefighters*. Also, the underlying injunctions continue in effect. Therefore, the important policy issues posed by this appeal may evade review should the Court remand this case as respondents suggest.

In conclusion, the respondents have failed to carry their "heavy burden" of demonstrating mootness. This controversy has not been mooted as a result of changed

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1. Those firefighters who were reduced in rank also continue to suffer continued adverse effects. While reduced in rank, those more senior white firefighters lost their opportunity to take examinations for the purpose of securing promotions to the next higher rank.

circumstances by intervening legislation or otherwise. In fact, a live controversy still exists. Petitioners retain a legally cognizable interest in the outcome of this case as they suffer continuing adverse impact as a result of the orders below. The orders below remain in effect under their own terms. Respondents have failed to demonstrate that assurances can be made that there is no reasonable expectation of future layoffs. Finally, this dispute may be characterized as one "capable of repetition, yet evading review." Petitioners respectfully submit that the respondents' suggestion of mootness should be rejected and a writ of certiorari should be granted so that the Court can consider this controversy on the merits.

Respectfully submitted,

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